

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

May 3, 2006

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In the Matter of  
Celus Fasteners Mfg., Inc.

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Docket No. 2006-035  
File No. PAN-NE-06-9001-2

**RECOMMENDED FINAL DECISION**

Celus Fasteners Mfg. Inc. (Celus), filed a Notice of Claim for an adjudicatory hearing seeking review of both a Notice of Intent to Assess a Civil Administrative Penalty (PAN) and Unilateral Administrative Order (UAO) issued by MassDEP to Celus. The petitioner's initial filings did not include a number of items required to file an effective appeal, and an Order to File a More Definite Statement was issued requiring submission of copies of the appealed documents, payment of an additional appeals filing fee for the second Claim, and relevant evidence on the question of the timeliness of the petitioner's Claims. The petitioner responded by providing copies of the appealed documents and payment of the second appeal filing fee, satisfying those two requirements. In addition, the petitioner responded with information about the timeliness of its Claim.

After reviewing the submissions concerning the timeliness of its appeal, I gave notice to the parties of my intent to take administrative notice of information from the U.S. Postal Service regarding the date of delivery of the petitioner's Claims to the Department. This Order to Show

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Cause allowed time for the parties to comment on that information, and show cause why the petitioner's Claim for an adjudicatory hearing for the PAN should not be dismissed as untimely. After considering both parties' responses I conclude that the petitioner's Claim for an adjudicatory hearing to review the PAN was untimely, and recommend its dismissal.

The analysis of the timeliness of the Claim must begin with the date of issuance of the appealed document. "Date of issuance" for a PAN is defined in the Department's regulations at 310 CMR 5.08, and depends upon the method used by the Department for its delivery. When a PAN is delivered by mail, as it was here, the document is deemed issued on the date it is postmarked by the U.S. Postal Service. 310 CMR 5.08(2). A request for an adjudicatory hearing concerning a PAN must be *received* by the Department by the twenty-first day after its issuance. 310 CMR 5.35. If no request is received by the twenty-first day, the person to whom the PAN is directed waives their right to appeal the civil assessment. Id.

The PAN and its cover letter are dated Friday February 3, 2006, and were mailed together along with the UAO to the petitioner on the same day in the same envelope. Petitioner's Response to Order to File a More Definite Statement. A copy of the envelope in which the documents were sent from MassDEP to the petitioner was included with petitioner's Response to the Order to File a More Definite Statement. The date of the postmark on the copy of the envelope is, however illegible on the copy provided, although it is clear that it was mailed in February of 2006. The petitioner's Response states the postmark date on the envelope is February 6, 2006.<sup>1</sup> Assuming the PAN was postmarked, as the petitioner asserts, on Monday

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<sup>1</sup> The Department's Response to the Order to Show Cause suggests that the petitioner be required to submit the envelope for examination. Because the analysis that follows assumes the later date of issuance of February 6<sup>th</sup> results in a conclusion that the Claim was untimely, I decline to do so. Any earlier date of issuance (such as February 3<sup>rd</sup>) would not change that conclusion.

February 6, 2006 the twenty-first day after that day was Monday, February 27, 2006, and the petitioner's Claim appealing the PAN had to be received on or before that day.

Both of the petitioner's Claims for the PAN and UAO are dated February 24, 2006 and were sent by certified mail, return receipt requested. In its Response to the Order to Show Cause, Celus provided copies of the certified mail green card and certified mail receipt showing a handwritten date in the area for the postmark of February 24, 2006. The green card was stamped received by the Department on February 28, 2006. This date of receipt by the Department is corroborated with results of a track and confirm search using the certified mail number from the Claim's caption on the tracking system of the U.S. Postal Service website. I take administrative notice of information from the U.S. Postal Service track and confirm service indicating the item bearing that number was delivered to zip code 02108 (where the Department's Boston office is located) on Tuesday, February 28, 2006.<sup>2</sup>

Presuming the later date of issuance of the PAN from the Department of Monday February 6, 2006 the Notice of Claim had to be received by MassDEP twenty-one days later, or by Monday February 27, 2006. I find that the petitioner's Claim was not received by the Department until Tuesday February 28, 2006, one day past the deadline. As a result, the petitioner waived its right to request a hearing.

The petitioner argues in its Response to the Order to Show Cause that it mailed the request for a hearing on February 24<sup>th</sup> and that the four days it took the Postal Service to deliver

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<sup>2</sup> The rules for adjudicatory hearings allow a Presiding Officer to take administrative notice under the provisions of 310 CMR 1.01(13)(l) "of any fact which may be judicially noticed by the courts. Those facts include "matters of common knowledge or observation within the community." Dimino v. Secretary of the Commonwealth, 427 Mass. 704, 707, 695 N.E.2d 659 (1998) citing Nantucket v. Beinecke, 379 Mass. 345, 352, 398 N.E.2<sup>nd</sup> 458 (1979).

the request was excessive. Urging that delivery by the Postal Service was out of its control the petitioner claims it acted in a timely manner and requests that further proceedings be scheduled.<sup>3</sup>

Although I am sympathetic to the petitioner's argument concerning the delivery time that included a weekend, the date the petitioner mailed the Claim is not directly relevant to the timeliness of a claim for a PAN. The appeal period stops upon the Department's receipt, and not when a Claim is mailed. 310 CMR 5.08. This time period to file an appeal was explained in the PAN and the petitioner possessed all the information needed to file a timely appeal.<sup>4</sup> Further, the petitioner could have used other means within its control to assure receipt by the Department before the deadline by hand delivering the appeal, or allowed for additional time for delivery by mail.

The deadline for filing appeals "is not simply a procedural formality which may be waived by the Department . . ." and failure to comply with the time requirement "is a jurisdictional defect, and requires dismissal of the appeal." Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993). See also Matter of Sunoco Inc., (R&M), Docket No. 2003-035, Recommended Final Decision (September 16, 2003) adopted by Final Decision (October 1, 2003); Matter of Parks, Docket No. 88-206, Final Decision-Order of Dismissal (April 9, 1991). There is no allowance for dispensations from the

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<sup>3</sup> Petitioner also requested a copy of the envelope in which it sent the Claim to MassDEP at One Winter Street, noting that it should be in the Department's possession. Although it is the usual practice of this office to retain envelopes containing initial Claims, the envelope in this case is not in the record. The only copy of the Claim that is included in the record was sent with the appeal filing fee to the Department's "lockbox." From there the Claims were forwarded to this office, and were stamped received here the following day, March 3, 2006. The Claim sent to the lockbox was received there on March 2, 2006, two days later than the February 28<sup>th</sup> date of receipt of the Claim sent directly to MassDEP at One Winter Street, as evidenced by the Postal Service records.

<sup>4</sup> The PAN at section III, paragraph 12(2) states: "Effective twenty-one (21) days after the date of issuance of this Notice, Celus shall be deemed to have waived its right to an adjudicatory hearing on this civil administrative penalty assessment unless, within said twenty-one (21) days, Celus files with the Department (i.e. the Department receives)" a written request for a hearing. The required contents of such a request are then described.

appeal filing deadline. Once the right to request an appeal is waived, the Department has no jurisdiction to consider the claim, and dismissal must follow.

Because the petitioner's Claim for an adjudicatory hearing on the PAN was received after the statutory and regulatory time period for making such a request, it is untimely, and I recommend its dismissal for lack of jurisdiction pursuant to 310 CMR 1.01(5)(a)15.f.v.

### **NOTICE**

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion directs otherwise.

This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.

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Ann Lowery  
Presiding Officer

*Adopted by Commissioner Robert W. Golledge, Jr., May 8, 2006.*